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No. 92-38

In The

Supreme Court of the United States

October Term, 1992

CHRYSLER CORPORATION,

Petitioner,

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO; AND LOCAL 793 THEREOF,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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12

TABLE OF AUTHORITIES

Page

CASES:

American Postal Workers Union v. *United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986)..... 9

Chicago Newspaper Guild v. *Field Enterprises, Inc.*, 747 F.2d 1153 (7th Cir. 1984)..... 3

Communication Workers v. *Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989)..... 6

Delta Air Lines v. *Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988), cert. denied, 493 U.S. 871 (1989) 10

E.I. du Pont de Nemours v. *Grasselli Emp. Ass'n*, 790 F.2d 611 (7th Cir.), cert. denied, 479 U.S. 853 (1986) 9

Muschany v. *United States*, 324 U.S. 49 (1945)..... 7

Newsday, Inc. v. *Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), cert. denied, 111 S. Ct. 1314 (1991) 6, 10

Paperworkers v. *Misco, Inc.*, 484 U.S. 29 (1987).....*passim*

Stroehmann Bakeries, Inc. v. *Local 776, International Bhd. of Teamsters*, No. 91-5261, 1992 WL 150962 (3d Cir. June 29, 1992)..... 1, 5, 6

REGULATION:

29 C.F.R. § 1604.11 4

REPLY BRIEF FOR PETITIONER

The Seventh Circuit in this case enforced an arbitration award that ordered Chrysler to return to its workforce a man who sexually assaulted a co-worker by reaching around from behind her and grabbing her breasts – and who had a history of sexually harassing female employees. In our certiorari petition, we showed – and respondents do not refute – that the court of appeals' decision adds to the enormous confusion surrounding the public policy doctrine, threatens efforts to end workplace sexual harassment, and creates intolerable uncertainties for employers trying to fulfil their Title VII obligations to provide a workplace free of sexual harassment.

Our petition demonstrated that the courts of appeals are divided over whether an arbitrator's award requiring reinstatement of a repeat sexual harasser violates public policy; since we prepared our petition, that division has become still deeper. In *Stroehmann Bakeries, Inc.* v. *Local 776, International Bhd. of Teamsters*, No. 91-5261, 1992 WL 150962 (June 29, 1992), the Third Circuit, over a dissent, refused to enforce an arbitrator's award reinstating a sexual harasser. Our petition showed as well how the Seventh Circuit ignored the command of *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29 (1987), by declining to take account in its public policy inquiry of the established fact that the discharged employee had engaged in multiple acts of sexual harassment. In addition, the courts below aligned themselves with the minority of circuits that refuse to enforce an arbitration award on public policy grounds only when the award itself violates the law or requires the employer to do so. The two *amicus* briefs filed in support of our petition by the Florida Association

for Women Lawyers, the NOW Legal Defense and Education Fund, the Center for Women Policy Studies, the Center for Constitutional Rights, and the Equal Employment Advisory Council further attest to the need for this Court's intervention to bring an end to this confusion and to the severe consequences for women and their employers if the decision below is permitted to stand.

Respondents' brief in opposition simply fails to come to grips with our petition. It mischaracterizes our arguments about what the public policy against sexual harassment requires of employers; it misreads *Misco* and many of the courts of appeals' decisions that we cited; and it misunderstands the import of the decision below. Most conspicuously, respondents have no answer to our complaint that the Seventh Circuit's ruling is a serious obstacle to employers seeking to comply with Title VII and creates new risks of Title VII liability for compensatory and punitive damages. Nor do they offer any response to our conclusion that the decision below guts the public policy doctrine and effectively makes arbitration decisions unreviewable. For the reasons stated in our petition, and in the *amicus* briefs filed in support of the petition, this Court should grant the petition and address the important and troublesome issues raised by the court of appeals' decision.

I. As a preliminary matter, we must briefly address respondents' conclusory assertion that this case is moot (Br. in Opp. 3 n.2), and its veiled suggestion that it would somehow be imprudent for the Court to decide the questions we have presented because the Union has appealed the district court's denial of its contempt motion. *Id.* at 2-3. Both claims are specious. As we explained in our

petition (at 9 n.3), Chrysler's reinstatement and immediate firing of Mr. Gallenbeck does not moot any of the questions presented because the arbitrator's reinstatement award requires the company to make Mr. Gallenbeck whole for all lost pay and benefits for the period between the two occasions on which he was fired, except for the 30-day suspension held proper by the arbitrator. (Pet. App. 62a). It is the reinstatement award that has this consequence, and it is the reinstatement award that Chrysler challenges.

The Union's appeal of the denial of its contempt motion is wholly irrelevant to the issues we ask this Court to review. The district court held that Chrysler's firing of Mr. Gallenbeck immediately after his reinstatement – because of repeated acts of sexual harassment uncovered during preparation for the arbitration hearing – "was not addressed in the original arbitration award" (Pet. App. 63a) and so could not be in contempt of the court's order enforcing that award. That decision is clearly correct. See, *e.g.*, *Chicago Newspaper Guild* v. *Field Enterprises, Inc.*, 747 F.2d 1153, 1156 (7th Cir. 1984) (reinstated employee is "in the same position as any other employee * * * and would be subject to any lawful * * * discharge. Any future employment decisions affecting [the reinstated employee] would, of course, be evaluated independently"). More important, the Union's contempt action is a collateral proceeding that raises no question at all about the Seventh Circuit judgment of which we seek review, which establishes the law of the case.

II. Respondents contend that public policy does not prevent the enforcement of an arbitral award reinstating an employee found to have engaged in egregious sexual assaults and harassment, and that the lower courts

are uniform in recognizing this. They are seriously mistaken on both counts.

(a) The Union concedes (Br. in Opp. 8) that Congress and the courts have articulated a strong public policy against workplace sexual harassment. It also acknowledges (*ibid.*) that a key element of that public policy is Title VII's requirement that an employer "take all steps necessary to prevent sexual harassment," including *"developing appropriate sanctions."* 29 C.F.R. § 1604.11(f) (emphasis added). An employer that fails to take "immediate and appropriate corrective action" in response to sexual harassment (*id.*, § 1604.11(d)) risks liability for damages, including punitive damages, under Title VII. See Pet. 18.

The Union suggests that an employer might protect its women workers from sexual assaults of the sort that occurred here by "posting * * * notices on bulletin boards." Br. in Opp. 8. But it is the employer that is charged by Title VII with the duty to eliminate sexual harassment from the workplace, and the employer must "develo[p] appropriate sanctions" to this end. The arbitrator's award in this case flatly confounds Chrysler's determination of the action necessary to fulfil the company's Title VII obligations. Chrysler's discharge of Mr. Gallenbeck signaled its workforce that sexual harassment would not be tolerated; the arbitrator's decision sent just the opposite signal and relegated egregious sexual assaults to the category of "less serious" offenses. A clearer violation of Title VII's policy than the arbitrator's reinstatement of Mr. Gallenbeck – by that time known to be a persistent sexual harasser – is hard to imagine. A judgment more at odds with the national policy to end the sexual denigration of women in the workplace would

be hard to find. See Pet. App. 51a (sexual assault a "[l]ess serious infractio[n]" than "extremely serious offenses, such as stealing or striking a foreman").

Respondents nowhere advert to the arbitrator's finding that sexual harassment is a "[l]ess serious infractio[n]" than "stealing or striking a foreman." That finding makes a mockery of respondents' assertion (Br. in Opp. 4) that the arbitrator's just cause determination took proper account of the public policy against sexual harassment.

(b) Our view that the arbitrator's reinstatement award violated public policy has received further support since we prepared our petition. In *Stroehmann Bakeries*, a Third Circuit majority held that "[i]n addition to the public policy against sexual harassment in the workplace," there is "a well-defined, dominant public policy favoring *voluntary employer prevention* and *application of sanctions*" against workplace sexual harassment. 1992 WL 150962, at *6 (emphasis added). The employer's discharge of an employee whom it determined had sexually harassed a customer "observed and advanced this public policy." *Ibid.*

In *Stroehmann*, the arbitrator questioned whether the employer had established that the alleged sexual assault in fact took place, and ordered the employee reinstated. The court of appeals held that this award violated public policy because it allowed "a person who *may have* committed sexual harassment to continue in the workplace," though a determination that the assault did not occur had not been made. 1992 WL 150962, at *6 (emphasis added). Reinstatement of a suspected sexual harasser "does not discourage sexual harassment," the majority held, but "undermines the employer's ability to fulfill its obligation to prevent * * * sexual harassment." *Ibid.* Clearly,

then, had sexual harassment been proved, as it was in this case, the Third Circuit majority would not have countenanced reinstatement of the offender. Cf. Br. in Opp. 12-13. Indeed, Judge Becker, in dissent, explicitly noted the conflict between the majority's decision and both the Seventh Circuit's ruling here and the Tenth Circuit's ruling in *Communication Workers* v. *Southeastern Elec. Coop.*, 882 F.2d 467 (1989) (discussed at Pet. 20-21).[1]

(c) Respondents' efforts (Br. in Opp. 10-12) to explain away the conflict between the decision below and *Newsday, Inc.* v. *Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), are no more availing. To be sure, the employee reinstated in *Newsday* had previously been disciplined for sexual harassment, but that is not a ground for distinguishing between these two diametrically opposed cases. The arbitrator's decision in *Newsday* that discharge was not an appropriate punishment under the company's practice of "progressive discipline" necessarily depended on the belief that the employee was amenable to rehabilitation if disciplined and warned. 915 F.2d at 843. That factual determination is also precisely the one made by the arbitrator in this case. Thus, as to the facts relevant to the arbitrators' rulings – as well as to the questions for the courts of appeals' decisions (see Pet. 19-20) – *Newsday* and the present case are on all fours.

(d) *Newsday*, *Stroehmann*, *Communication Workers*, and the decision below show that the courts of appeals are in disarray as to the proper application of the public

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[1] We understand that a petition for certiorari will be filed in *Stroehmann*. This Court may wish to consider *Stroehmann* and this case together.

policy doctrine in cases in which an arbitrator has reinstated a sexual harasser. Respondents' claims to the contrary notwithstanding, *Misco* has obviously proved an insufficient guide to decision in such cases. *Misco* is manifestly not a "carbon copy" of this case, as the Union asserts. Br. in Opp. 6. The Court in *Misco* held that the "public policy" identified by the lower court had *not* been "ascertained 'by reference to the laws and legal precedents [rather than] from general considerations of supposed public interests.' " 484 U.S. at 44, quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945). *Misco* thus provides little practical guidance in cases where an unmistakable and well-developed public policy is in issue – particularly one like the policy against workplace sexual harassment, which derives from a statutory scheme that places substantial duties upon employers to implement the policy.

It is also palpably erroneous for respondents to claim (Br. in Opp. 9-10) that *Misco* makes it "clear" that a court may not upset a reinstatement award on public policy grounds if the arbitrator found that the employee might be rehabilitated. The only language respondents cite for this proposition says that if an arbitrator found that an employee possessed drugs on plant premises but had not used and could be trusted in future not to use drugs at work, a court could not upset a reinstatement award because of its own views that plant safety was threatened. 484 U.S. at 45. What this Court did *not* say in *Misco* is that a reinstatement award would pass muster if the arbitrator had found that the worker had used drugs while on the job. That situation would be most comparable to the one in issue here, where the sexual assault took place at work. *Misco* says nothing about that situation.

III. Respondents apparently agree with us that, under *Misco*, a court called upon to decide whether an arbitrator's award violates public policy should consider established facts that were not taken into account by the arbitrator. Br. in Opp. 13-14 n.6. Respondents assert, however, that the court below applied this rule (see Pet. App. 8a-9a n.4) and ignored Mr. Gallenbeck's history of sexual harassment only because the arbitrator had not "established" that history as a fact by finding that other incidents of sexual harassment testified to at the hearing had occurred. *Ibid.* If we accept respondents' strained interpretation, the Seventh Circuit adopted an absurdly circular definition of what "established facts" a reviewing court may consider, one so demonstrably at odds with *Misco* as to require correction by this Court.

This Court stated in *Misco* that "[i]n pursuing its public policy inquiry, the Court of Appeals quite properly considered the established fact that traces of marijuana had been found in [the discharged employee's] car." 484 U.S. at 44. But that "established fact" had never been found by the arbitrator. On the contrary, the arbitrator had refused even "to accept into evidence the fact that marijuana had been found in [the employee's] car," because the employer had not been aware of that fact when it discharged the employee. *Id.* at 34. *Misco* therefore shows that for purposes of the public policy inquiry, facts may be established other than by an arbitrator's formal factfinding.

Indeed, any other view would insulate arbitrators' decisions from meaningful review on public policy grounds. An arbitrator who declined to admit evidence of facts or who declined to make a finding based on that evidence would thereby make it impossible for a court to

consider those facts even if they were highly pertinent to the issue whether an award violates public policy. Moreover, respondents do not even attempt to refute our argument (Pet. 23-26) that it makes no sense to insist that an arbitrator's decision about what evidence is relevant to one inquiry – whether there was just cause for discharge – should govern the facts that a court may consider when conducting the legally distinct inquiry whether the arbitrator's award violates public policy.

Just as this Court held in *Misco* that the arbitrator's refusal to find that the discharged employee had possessed drugs on company premises did not prevent the court of appeals from considering that fact in its public policy analysis, so here the Seventh Circuit should have considered Mr. Gallenbeck's admitted history of having "ass grabbed" female co-workers on four occasions (Chrysler Arb. Br. at 12), even though the arbitrator did not formally find that as a fact because he refused to consider that undisputed evidence. Any other approach would turn public policy review into an empty exercise.

IV. The district court – obviously (and with good reason) believing it was applying the law of the Seventh Circuit – explicitly held that no public policy barred Mr. Gallenbeck's reinstatement because "[n]o statute or judicial opinion * * * makes it *illegal* to employ a person who has sexually assaulted or harassed a co-worker on one occasion." Pet. App. 37a (emphasis added). The court of appeals never questioned that rationale, which also represents the position taken by the District of Columbia Circuit. See *American Postal Workers Union* v. *United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). See also *E.I. du Pont de Nemours* v. *Grasselli Emp. Ass'n*, 790 F.2d 611, 620 (7th Cir. 1986) (Easterbrook, J. concurring). In these

two circuits, therefore, the courts have answered in the affirmative the question left open in *Misco*, 484 U.S. at 45 n.12, whether a court may refuse to enforce an award only when it violated the law or required the employer to do so.

We showed in our petition (at 28) that the law in other circuits does not require that an arbitrator's award be illegal, only that, in all the circumstances, it be contrary to public policy. In *Newsday* and *Delta Air Lines* v. *Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988), the courts refused to enforce reinstatement awards, though the awards were not illegal and required no illegal conduct of the employer. The conflict among the circuits on this issue is undeniable and should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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